IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.

(1) C.W.P. No. 12623 of 2007

M/S Nair Coal Service Ltd., Nagpur.

..... Petitioner through Shri
D.S.Patwalia, Advocate.

Versus

Punjab State Electricity Board and others.

..... Respondents through Shri
H.S.Mattewal, Senior
Advocate with Shri
H.S.Sidhu, Advocate.

(2) C.W.P. No. 12646 of 2007

M/S Naresh Kumar and Company, Kolkata.

..... Petitioner through Shri
Rajiv Atma Ram, Senior
Advocate with Shri
B.N.Sharma, Advocate.

Versus

Punjab State Electricity Board and others.

..... Respondents through Shri
H.S.Mattewal, Senior
Advocate with Shri
H.S.Sidhu, Advocate.

Date of Decision: 9.10.2007

CORAM: HON'BLE MR. JUSTICE VIJENDER JAIN,
CHIEF JUSTICE
HON'BLE MR.JUSTICE MAHESH GROVER

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1. Whether Reporters of Local Newspapers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

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VIJENDER JAIN, CHIEF JUSTICE

This order will dispose of the above mentioned two writ petitions as they involve common questions of facts and law and are the result of the common grievance which has been aired in them.

The petitioners have impugned Notice Inviting Tender (NIT) dated 18.7.2007 issued by Punjab State Electricity Board (hereinafter described as `the respondent-Board') for the purpose of supply of coal to Thermal Plants in the State of Punjab.

It has been averred that normal practice all over the country for procuring coal for Thermal Plants by way of floating of the following two kinds of tenders:-

(i) For the purpose of rendering liaison service for optimum linkage materials so that the coal can be procured from the coal field and supplied to the Thermal Plants.

(ii) Liaison work for regular freight prepayment which basically is a banking function whereby a particular firm or company has to make deposit with the Rail Authority and to ensure that the payment to the rail Authorities are made on time.

It has further been averred that the respondent-Board, however, has floated only one kind of tender, i.e., for rendering liaison service for optimum linkage of material. In the year 2002-03, without officially floating any tender, the respondent-Board had given the work of liaison for railway freight prepayment to the existing tenderer and this arrangement continued till the year 2006 when notice inviting tender was floated for

prepayment of the railway freight for the first time. Only one company, i.e. M/S KCT and brothers Ltd. participated in response to this notice and since it was earlier catering to the needs of the respondent-Board, it was granted this contract as well.

It has been alleged that in the year 2007, the respondent-Board combined both the tenders and issued the NIT on 16.4.2007 deviating from the normal practice and imposed an oppressive condition of minimum turn over of Rs.250 Crores which was done ostensibly with a view to accommodate the existing operator, i.e. M/S KCT Brothers Ltd. The petitioners and other prospective tenderers represented against the said condition and as a result thereof, the same was reduced to a minimum turn over of Rs.100 Crores as a pre-qualification and with this amended condition, the impugned NIT has been issued.

The grievance of the petitioners is that the condition as contained in Clause (c) (ii) of the pre-qualifications mentioned in the NIT dated 18.7.2007 whereby a minimum turnover of Rs.100 Crores has been insisted upon, was not only oppressive, but was designed to favour M/S KCT Brothers Ltd. to the exclusion of all other prospective tenderers. It has been pleaded that the imposition of such a condition has no nexus with the object sought to be achieved because as per Clause (f) of the pre-qualifications contained in the impugned NIT, the financial status of the bidders was to be assessed separately. The said clause is reproduced below:-

"The bidder should be financially sound and must have

minimum turnover of Rs.10 Crores during the year 2005-06 for which the audited balance sheet for 2005-06 shall be submitted. The turnover and experience of only the bidding company would be taken into account and not that of sister company/ joint venture or group of companies. Audited balance sheet duly audited by the Chartered Accountant for the year 2005-06 must be produced as a proof along with the application for issue of tender documents."

In the writ petitions, the petitioners have also made a grouse of Clause (c) (i), which reads as under:-

"The firm should have experience of dealing with the Railways for prepayment of freight for transportation of Coal from Coal fields of Coal India Limited for any public sector undertaking/ Industry/ Power Utilities for a minimum period of two years. The documentary evidence of relevant experience must be submitted along with the application for issue of tender document."

However, there is no need to elaborately delve upon this aspect of the matter as during the course of arguments, it was informed that the aforesaid condition stood deleted as is evident from Annexure R12(in C.W.P.No.12623 of 2007), leaving a shrunken grievance of the petitioners, which is qua the following condition contained in Clause (c) (ii) of the pre-qualifications of the impugned NIT:-

"The firm should have minimum turnover relating to freight

pre-payment to Railways for transportation of coal from Indian Coal Mines for a minimum amount of Rs.100 Crores for any financial year in the preceding 2 years ending 31.03.2006. the firm should have net worth of minimum Rs.100 Crores as on 31.03.2006 & in support must produce audited balance sheet for the last 2 years ending 31.03.2006 along with the application for issue of tender documents."

Learned counsel for the petitioners referred exhaustively to the minutes of the meetings which led to the incorporation of the aforesaid condition, a perusal of which reveals that on any given point of time, the value of the contract, the goods and the payment involved did not exceed to Rs.25 to 30 Crores and in fact, the advance never exceeded Rs.10 Crores. Besides, the payment was to be made by the respondent-Board. In view of this, they contended that the insistence on the impugned condition was not understandable. That apart, they pleaded that the officials of the respondent-Board had, while commenting upon the representation of M/S Adani Enterprises Limited, stated that the existence of the condition in Clause (f) of the pre-qualifications contained in the NIT dated 18.7.2007 could not rule out the possibility of monopolization.

The relevant portions of the comments of the officials of the respondent-Board made qua the condition (c) (i) and (f) as contained in pre-qualifications mentioned in the NIT dated 12/16.4.2007 after the representation of M/S Adani Enterprises Ltd. was received, are extracted below:-

" (c) (ii) = It is felt that the condition put forth in the NIT, counting the turnover of Rs.250 Crores from INDIAN COAL MINES is slightly restrictive, but the same might have been put in the NIT, as PSEB recently had bad experience in respect of imported coal.

Since under the pre-payment mechanism Board will have to pay more than Rs.25-30 Crores as advance payment to prospective selected firm, therefore, for security sake the condition of net worth of Rs.100 Crore put in the NIT is in order.

(f) = ... It is felt that the emergence of oligopoly cannot be ruled out as there are limited firms with good background dealing in subject cited specialized jobs. However, from the clause (f) of PQC regarding condition of minimum income of Rs.10 Crore from coal liaisoning work during the period 2005-06. THE EXISTENCE OF MONOPOLY CANNOT BE RULED OUT."

The Committee constituted by the respondent-Board to review the pre-qualifications/ specifications contained in the NIT dated 12/16.4.2007 in the light of the representations made by M/S Adani Enterprises Ltd. and others, held its meeting on 21.5.2007. The relevant extracts of the minutes are reproduced below:-

"2. The Committee deliberated that both the works i.e. liaison work for linkage materialization & transit loss minimization

and liaison work for freight pre-payment work should be combined in a single work Order for:

(i) Better Liaisoning with railways for placement of rakes, collection of RRs and prepayment at the loading end.

(ii) Since both the works will be performed by a single contractor and it is expected to be cheaper to the PSEB in terms of rates quoted for the service charges since the same office of the contractor can handle both the jobs without any extra infrastructure.

(iii) No technical expertise is required for the work of railway freight pre-payment.

(iv) The advance amount is given by the Board to the contractor for payment of freight to the Railways and no amount of the contractor is involved.

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Clause- (c) (i):

To be deleted.

This clause has been deleted as the Committee was of the opinion that there is no extra technical expertise, skill or experience required by the contractor and the Board is to make the advance payment to the contractor for making the payment of freight to the Railways on behalf of Board at the loading end at the time of issue of RRs by Railways. So it is merely a

Bank transaction for which the financial soundness of the contractor is required which has already been taken care of in the other clauses of the PQC.

Clause- (c) (ii)

The Committee decided to replace this clause as under:

"The firm should have net worth of minimum Rs.100 Crores as on 31.3.2006 and in support of this the firm must produce audited balance sheet for the year ending 31.3.2006 along with application for issue of tender document."

Requirement of the minimum turn over of Rs.250 Crores as a Railway Freight Prepayment has been deleted in view of discussion on clause c (i). The contractor is to make the payment of Railway Freight out of the advance payment of the Board placed at the disposal of the contractor."

The respondents have filed the counter-affidavits refuting the allegations of the petitioners.

During the course of hearing, Shri H.S.Mattewal, learned Senior Advocate appearing for the respondents sought time in order to seek instructions as to whether the offending clause could, in any way, be diluted so as to take away its sting.

It was then brought to the notice of this Court that a fresh decision has been taken and now, as per the tender specifications, the

successful bidder is required to give a bank guarantee of Rs.33 Crores before release of the advance payment by the respondent-Board and as per the latest decision, such successful bidder should have minimum net worth of Rs.45 Crores as on 31.3.2006 instead of turnover of Rs.100 Crores, as one of the pre-qualifications.

An affidavit dated 10.2007 of Shri G.S.Chhabra, Chief Engineer (O.&M.), G.H.T.P., P.S.E.B., Lehra Mohabbat has been placed on record to support the aforementioned assertion.

The aforesaid toned down turnover is also not palatable to the petitioners. It has been contended by the learned counsel for the petitioners that this condition was also oppressive.

C.M.No.16879-80 of 2007 was moved by the petitioner in C.W.P.No.12623 of 2007 for placing on record a copy of letter dated 3.10.2007 which has been sent by Nagpur Branch of the Union Bank of India vide which the authorities of the respondent-Board have been informed that bank guarantee of Rs.45 Crores would be extended in favour of M/S Nair Coal Services Limited for execution of work order awarded to it by them. This application has been allowed by a separate order of today.

On the basis of the above letter, learned counsel for petitioner-M/S Nair Coal Services Limited contended that there is no need to insist on the net-worth of the company or requiring its turnover to be of Rs.45 Crores as it is willing to give bank guarantee of Rs.45 Crores. He submitted that this condition being oppressive is meant to oust petitioner-M/S Nair Coal Services Limited and other similarly situated bidders from participating in

the tender process. He argued that for the reason that the condition of turnover of Rs.100 Crores as contained in Clause (c) (ii) was oppressive, for the same very reason, the condition of Rs.45 Crores was also oppressive.

At this stage, learned Senior Advocate appearing for the respondents made a statement that the respondent-Board is prepared to further tone down this condition and reduce the turnover to Rs.25 Crores as a pre-qualification condition.

Even this further tonning down of the turnover to Rs.25 Crores was not acceptable to the learned counsel for the petitioners even though a specific query was put to them, but they declined to accept the offer as a measure of satisfaction of their grievance.

We have considered the matter in the above said perspective and initially, we were of the opinion that the condition of insistence upon Rs.100 Crores as the net worth of a bidder was, indeed, oppressive and did not have any nexus with the object sought to be achieved, especially in the light of the reasoning which had gone into the process, but since an assurance has been given before this Court that the condition of Rs.100 Crores will no longer exist and instead, a condition of Rs.25 Crores would be applicable, we are of the view that the respondents have been extremely fair in their approach towards the controversy.

In the award of a contract pursuant to a process which is initiated by the government or its functionaries, some of the valid pre-requisites which can be considered at the time of grant of contract, are:-

(i) financial viability of a bidder.

(2) its previous conduct.

(3) its capacity to meet the requisites of the contract.

(4) its experience in handling such contracts etc.

These being some of the legitimate considerations, we do not find that the condition of the insisting on a bidder's net worth/ turnover being Rs.25 Crores in view of the magnitude of the contract is, in any way, harsh as the respondents are well within their right to assess the financial viability and the worth of a company with which they propose to deal in the eventuality of the contract being awarded to it.

Hence, in view of the fact that the offending clause of insisting upon the turnover of Rs.100 Crores as a pre-qualification for participating in the tender process by a bidder having been toned down and diluted to mean Rs.25 Crores, we feel that this condition is neither harsh nor oppressive and answers the legitimate concerns of the respondents.

On the basis of the above discussion, we do not find any merit in the writ petitions and the same are hereby dismissed.

(Vijender Jain)
Chief Justice

October 09,2007
"SCM"

(Mahesh Grover)
Judge